

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

FEB 23 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2009-0270-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
DIANE CRUZ RIVERA,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20083848

Honorable Deborah Bernini, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Isabel G. Garcia, Pima County Legal Defender  
By Alex Heveri

Tucson  
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Petitioner Diane Cruz Rivera was charged with second-degree burglary, theft by control and/or controlling stolen property, and trafficking in stolen property for her role in the burglary of her stepmother's home. Pursuant to a plea agreement, she pled

guilty to theft by control and/or controlling stolen property, admitting she had, without permission, possessed over \$1,000 worth of her stepmother's jewelry and sold it to a pawn shop. The court sentenced Rivera to a presumptive, one-year prison term.

¶2 Subsequently, Rivera challenged her sentence in a petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., claiming the court had abused its discretion and acted arbitrarily and capriciously in failing to suspend the imposition of sentence and place her on probation. The trial court summarily dismissed the petition, and this petition for review followed. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion."<sup>1</sup> *State v. Swoopes*, 216 Ariz. 390, ¶4, 166 P.3d 945, 948 (App. 2007).

¶3 Rivera's claim is premised on the following exchange between her and the court during the sentencing hearing.

The Court: Okay, I have to ask you a question. And how truthful you are when you answer this question is going to make the difference on whether or not I give you a shot at probation and pay[ing the victim] back or I send you to prison, because that's where I'm headed this morning.

The Defendant: All right.

The Court: Okay. Did you go in [the victim's] house and take her property?

The Defendant: No.

---

<sup>1</sup>Although it appears that Rivera may have already completed her sentence, which was to date from January 14, 2009, her petition is not moot, because she contends the court's imposition of a sentence of imprisonment deprived her of "a chance at a misdemeanor designation of her offense."

The Court: You're going to prison. I don't believe you for a second. And the fact that you can't admit that you were in her house or waiting outside in the driveway in the white car—

The Defendant: I was waiting outside, but I didn't go into her house.

The Court: Okay. Your chance to tell me the truth just went away. That's not accepting responsibility. That's not remorse. You've had your opportunity. You're done. And I don't believe because of the way you answered that question that you'll pay her back.

. . . .

That[] was the worst lie you have ever told. I had probation conditions right here.

¶4 Rivera contends the court “abused its discretion by basing its sentence upon [an] answer[] the court deemed to be untruthful, despite contrary evidence.” She contends that her answer to the court’s question was consistent with the evidence in that her “print[s]” were not found on the victim’s door, the items taken did not require two people to carry from the victim’s house, and a neighbor who had seen a white car pull up in the driveway had “felt certain” Rivera had been in the car, but the neighbor had not seen Rivera get out of the car.<sup>2</sup> She points out that her answer “did not negate the factual basis for the [guilty] plea,” and she argues that the answer, “if truthful, did not warrant a prison sentence and a felony designation.”

---

<sup>2</sup>Rivera states that the neighbor did not see Rivera get out of the car “[a]lthough she watched.” The police report that Rivera cites as support for this assertion, however, contains no statement that the neighbor had watched the car for any length of time. Indeed, it suggests that the neighbor did not see anyone get out of the car, not just Rivera.

¶5 A trial court has wide discretion in sentencing criminal defendants and, if a sentence is within statutory limits, we will find an abuse of discretion only if the court displays “arbitrariness, capriciousness, or fail[s] to conduct an adequate investigation into the facts relevant to sentencing.” *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985). Here, in denying post-conviction relief, the trial judge explained:

At sentencing, the Court was informed that the defendant was again denying her involvement in the burglary and theft of the victim’s property. The Court warned her that a prison sentence was being considered and inquired a second time into the factual basis for the guilty plea. The Petitioner denied participation and knowledge of the burglary and displayed a complete lack of remorse for her role in the theft while doing so.

Even were we to disagree with the court that Rivera’s answer to its question, on its face, did not constitute a complete denial of her participation in and knowledge of the burglary, the court also stated it had based her presumptive sentence on other factors: “including, but not limited to, the loss to the victim, the attitude of the Petitioner at the sentencing hearing, lack of remorse, failure to accept full responsibility, and the information available in the Presentence report.” Indeed, Rivera had admitted in her statement in the pre-sentence report only that a friend had given her jewelry that she had pawned. She did not admit even waiting in the car during the burglary, and she denied knowing about the television set that had also been taken. Although such admissions were not necessary to supply a factual basis for her plea, we cannot find the trial court abused its discretion in determining, based in part on Rivera’s changing story, that she had not taken full responsibility for her actions or appropriately expressed remorse, even if she had been

technically truthful in answering the trial court's question. Nor can we say, given the court's explanation of the reasons for its sentence, that it abused its discretion by summarily dismissing Rivera's claim for post-conviction relief based on its review of the record and its original sentencing decision.

¶6 Therefore, although we grant Rivera's petition for review, we deny relief.

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge